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Supreme Court, U.S.  
FILED  
MAY 21 1984  
ALEXANDER L. STEVAS  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
CASE NO. 83-6736

TERRY MELVIN SIMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT CERTIORARI  
TO REVIEW AN EVIDENTIARY RULING OF THE STATE  
TRIAL COURT REGARDING THE SCOPE OF CROSS-  
EXAMINATION WHEREIN PETITIONER HAS NEVER  
DEMONSTRATED ANY PREJUDICE THEREBY AND WHERE  
THE FLORIDA SUPREME COURT CORRECTLY RESOLVED  
THIS ISSUE IN ACCORDANCE WITH THIS COURT'S  
APPLICABLE PRECEDENTS.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
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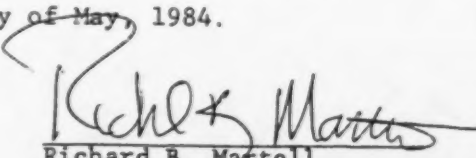
TERRY MELVIN SIMS,  
Petitioner,  
vs.  
STATE OF FLORIDA,  
Respondent.

CERTIFICATE OF SERVICE

I RICHARD B. MARTELL, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response to Petition for Writ of Certiorari to the Supreme Court of Florida, by depositing same in the United States mail, first class postage prepaid, as follows:

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All parties required to be served have been served on this 18th day of May, 1984.

  
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I.

OPINION BELOW

The Florida Supreme Court's opinion in this cause was reported as Sims v. State, 444 So.2d 922 (Fla. 1983), and a copy of such is included in Respondent's appendix (See Appendix, part A).

II.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In his pleading Petitioner contends that this case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as §921.141 Fla. Stat. (1977), Florida's capital sentencing statute. Inasmuch as Petitioner has raised no issue relating to his sentence of death in the instant petition, Respondent is unable to find the Eighth Amendment or §921.141 applicable. For reasons set out more fully below, Respondent also contends that Art.I §16 Fla. Const. and §90.612 Fla. Stat. (1977) are involved in this case. Art.I §16 is that provision of Florida's Constitution detailing the rights of an accused in a criminal proceeding; §90.612 is a legislative enactment of that portion of the Evidence Code involving, inter alia, cross-examination. Copies of these two provisions are included in Respondent's appendix (See Appendix, part B).

IV.

STATEMENT OF THE CASE

In his pleading, Petitioner has discussed in detail the evidence presented by the State and defense, in an attempt to put the evidentiary issues complained of in context. Respondent agrees that such task is necessary, but, no doubt due to the nature of the adversary process, disagrees with the emphasis given to or omitted from certain facts in Petitioner's recitation.

Accordingly, Respondent briefly restates that evidence below which it views as relevant to this Court's understanding of the issue presented.

While it is true that Curtis Baldree, a former co-defendant of Petitioner, whose cross-examination is the subject of this proceeding, can be described as a chief or key witness for the state, it must be noted that it was not Baldree's testimony alone which linked Petitioner to the shooting of George Pfiel. Baldree, as well as another co-defendant, James Halsell, testified as to the preparations made for the robbery which occurred, as well as the aftermath thereof, wherein Petitioner, wounded, acknowledged having shot a policeman (R310-322;332;436-446). Three independent witnesses identified Petitioner as one of the robbers of the pharmacy and one described him as the participant who herded many of the customers to the back of the store as the incident was progressing (R404;405;482-7;504;505). Witness Guggenheim testified the Petitioner had shot the deputy as the latter had tried to enter the store (R456). From the testimony of this witness, as well as that of Judith Thompson, it is clear the Petitioner fired the first shot (R496,472). Thus, despite the importance of Baldree's testimony, it is clear that the jury had other testimony upon which to rely in deciding upon Petitioner's guilt or innocence.

As Petitioner has also noted, an acquaintance of his, Bonnie McCumbers, testified at trial that he [Petitioner] had been in Lake City at the time of the incident (R598). It was, of course, up to the jury again to determine the weight to be accorded this testimony, just as it was up to them to consider many of the other matters cited by Petitioner, i.e. the drug use of Petitioner's co-defendants, some witnesses failure to identify Petitioner from photo lineups as opposed to at trial etc.

V. HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Respondent contends, inter alia, that no federal question is involved in this case and that Petitioner's claims as to cross-examination were resolved by the Florida Courts in terms of state, as opposed to federal, law. For the sake of convenience, however, Respondent details the manner in which the cross-examination issue was raised and decided below.

In order to preserve an issue for appellate review in Florida, a defendant must enter a contemporaneous and specific objection at the time a putative error is committed. See e.g. Castor v. State, 365 So.2d 701 (Fla.1978). The record in this case indicates that Petitioner imposed no objection to any of the court's rulings or statements during the cross-examination of witness Baldree. The only matter which could pass for an objection occurred shortly after all examination of the witness had ended and was made at a bench conference. At such time, one of Petitioner's attorneys stated that he wished to take issue with the court for having allegedly cut short the cross-examination of Baldree, as that witness's character and knowledge were relevant to the case (R468). It should be noted that Petitioner's counsel never stated those matters which he was allegedly prevented from raising. (See Appendix, part C, transcript of cross-examination (R446-470)).

In his appellate briefs to the Florida Supreme Court, Petitioner raised a broad-based point on appeal regarding the alleged restriction of cross-examination of witness Baldree. Petitioner argued then, as he does now, that cross-examination was not only curtailed by restrained by the trial court, the latter occurring whenever the trial court admonished defense counsel to "move along". Petitioner similarly identified at least five "examples" of restriction and further contended that the judge's very action in directing counsel to move along constituted prejudicial or reversible

error. It was in such appellate pleadings that Petitioner first identified the Sixth Amendment to the United States Constitution as having been violated at his trial (See Appendix, part D, excerpts of Initial and Reply briefs filed in appeal).

In its Answer brief Respondent in this case, the State of Florida, contested the preservation for review of any and all of Petitioner's arguments in relation to cross-examination; additionally, to the extent that the merits of any claim were addressed, the State relied solely upon Florida law (See Appendix, part E, excerpt of Answer brief filed in appeal). When the Florida Supreme Court resolved this issue in its decision in this case, a very narrow construction was utilized. The court described Petitioner's argument as constituting an assertion that his Sixth Amendment right to cross-examine a witness had been denied when the trial court curtailed defense examination of witness Baldree; the court noted that Petitioner relied upon one of its own prior decisions, Coxwell v. State, 361 So.2d 148 (Fla. 1978). The court examined the question only in reference to the trial court's sustaining of a state objection to defense questioning regarding an individual whom Petitioner allegedly resembled; this ruling of the trial court is identified as Petitioner's fourth example of the alleged restriction of cross-examination (See Petition at 14-15).

The Florida Supreme Court found that the ruling at issue did not constitute a curtailment of cross-examination requiring reversal under Coxwell. It was noted that the defense had been allowed extensive cross-examination of the witness and that the State's objection had only come after the defense questions had gone beyond the scope of Baldree's testimony on direct. The court expressly noted that the defense had not asked for an opportunity to make a proffer to show the relevance of "the information which it was seeking

to bring out", the court then found no error in the judge's ruling. (See Appendix, part A, copy of decision of Florida Supreme Court).

It is, thus, clear that the Florida Supreme Court examined Petitioner's issue on appeal only in reference to the correctness of the evidentiary ruling made. The Florida Supreme Court did not address the merits of any claim that cross-examination in toto had been curtailed or that the judge's comments in and of themselves had constituted prejudicial error. Further, the court's noting of Petitioner's failure to proffer would seem to indicate that, even as to the one ruling reviewed, complete preservation of the claim of error was not recognized. In short, Respondent disputes the contention in the petition to the effect that the Florida Supreme Court clearly resolved this issue on the merits (Petition at 2). Respondent also contends that to the extent that any issue was discussed on the merits, the matter was resolved on the basis of state, as opposed to federal, law; this argument will be more fully briefed below.

VI. REASONS FOR NOT GRANTING THE WRIT

Petitioner has urged this Court to grant certiorari to review an alleged curtailment and restriction of cross-examination in the lower court, and has further presented five specific questions regarding cross-examination which he asserts this case presents the perfect vehicle to resolve. Respondent disagrees. Whereas this Court has, in the past, granted certiorari where it has been felt that in a state proceeding a defendant's right to cross-examination has been impermissibly constrained, see e.g. Pointer v. Texas, 380 U.S. 400 (1965), Douglas v. Alabama, 380 U.S. 415 (1965), Smith v. Illinois, 390 U.S. 129 (1968), Davis v. Alaska, 415 U.S. 308 (1974), this case has nothing in common with such precedents. The instant case does not represent one in which the trial court declared a complete field of

inquiry off limits, as occurred in Smith and Davis, nor does it represent one in which the defense was denied all opportunity for meaningful confrontation, as in Douglas and Pointer. Rather, this case is one of many in which a state trial court exercised its discretion in passing upon an objection to one of the questions raised during cross-examination; Florida, as well as many federal courts, recognizes the broad discretion a trial judge enjoys as to the scope of permissible cross-examination. Petitioner has failed to make his case on both procedural and substantive grounds.

Before turning to the particulars of such, however, it is instructive to examine just what did, and did not, occur at Petitioner's trial. Petitioner has alleged that the trial judge not only restricted cross-examination on repeated occasions, but also curtailed it in toto by cutting off defense counsel. Petitioner has offered five discrete examples of "restriction" and urges this Court to grant certiorari in order to review a number of issues related to cross-examination, including whether or not the trial judge in this specific case was correct in regarding portions of defense counsel's cross-examination as repetitive. Respondent respectively submits that the latter question is not of constitutional moment. Further, the record in this case is clear that in every one of the five "examples" of "restrictions", Petitioner was deprived of nothing through the actions of the trial judge. Witness Baldree answered Petitioner's questions regarding his prior discharge of a firearm during an argument with his girlfriend (R456), co-defendant Halsell's purchase of nail polish for use during the robbery (R460), the date upon which he took Petitioner to Dr. Dunbar (R463) and his knowledge of one Terry Wayne Gale (R465-6); all questions related to collateral matters and Petitioner has never demonstrated that he was denied further interrogation on any one of these subjects. Similarly, although the terms of Baldree's deal

with the State were of greater importance, Petitioner never demonstrated that he wished to pursue the matter further, after the trial judge restated the plea agreement (R465-6). The Florida Supreme Court was correct in recognizing that Petitioner was afforded extensive cross-examination of witness Baldree, and whereas Petitioner has identified some important constitutional concepts in his petition, he has failed to demonstrate that he suffered the violation of any constitutional right during his state trial.

In Street v. New York, 394 U.S. 576 (1969) this Court held that when the highest court of a state has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can demonstrate otherwise. See also Cardinale v. Louisiana, 394 U.S. 437 (1969). As has been noted, Petitioner's only objection at trial was after the examination of witness Baldree had concluded and such objection was highly generalized; the Florida Supreme Court did not address at least 80% of Petitioner's argument in relation to cross-examination, and as to that portion addressed, the court noted that Petitioner had never proffered the evidence which he felt he had been prevented from bringing out. Again as noted earlier, Florida requires a contemporaneous specific objection in order to preserve a point for appellate review and additionally Florida courts have required that one seeking the admission of testimony must demonstrate its relevance. See e.g. Castor v. State, 365 So.2d 701 (Fla. 1978); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, \_\_\_ U.S. \_\_\_, 103 S.Ct. 274 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977). Respondent contends that the Florida Supreme Court's failure to address the bulk of Petitioner's argument as to cross-examination was a recognition that such point had not been properly presented and that, pursuant to Street, this Court should similarly decline to reach the issue.

Furthermore, even if any claim regarding cross-examination was properly presented below, the extent to which such claim related to the federal constitution is highly debatable. In the context of federal habeas corpus, the court in Chipman v. Mercer, 628 F.2d 528, 531 (9th Cir. 1980) observed that neither the confrontation clause nor the case-by-case application utilized by courts to resolve confrontation questions should be interpreted to permit persons convicted in state proceedings to use putative Sixth and Fourteenth Amendment claims as vehicles for obtaining federal review of evidentiary questions properly left to the state courts. Respondent contends that the above language is applicable to this situation, and that not every cry of "restriction of cross-examination" is synonymous with an allegation that a federal constitutional right has been violated. As noted earlier, Florida's Constitution confers the right of confrontation upon all accused. See Art.I, §16 Fla. Const. Whereas the Florida Supreme Court in its decision did note that Petitioner was alleging violation of his Sixth Amendment rights, and did not expressly cite to Florida's Constitution, Respondent still contends that an independent state ground exists to uphold Petitioner's conviction; similarly, it would seem that the court's finding that the questioning at issue was beyond the scope of direct examination was, while not expressly stated, premised upon §90.612(2) Fla. Stat. (1977). Accordingly, Respondent contends that Petitioner has failed to demonstrate that a federal claim was left unredressed or was addressed incorrectly by the Florida Supreme Court.

To the extent that the merits of Petitioner's claim are at all relevant, he has further failed to demonstrate that the trial judge abused his discretion in any manner relating to cross-examination or that, should such have occurred, he [Petitioner] was prejudiced to any degree thereby. In prior capital cases, among others, the Florida Supreme

Court has been stringent in protecting the defense's right to cross-examination, reversing when necessary as in Coxwell, but affirming when it is clear that the evidentiary ruling complained of was one merely within the discretion of the court and where at most only collateral or irrelevant matters were excluded. See Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied 456 U.S. 984 (1982); Maggard v. State, 399 So.2d 973 (Fla.), cert. denied 454 U.S. 1059 (1981); Steinhorst, supra; Washington v. State, 432 So.2d 44 (Fla. 1983); Justus v. State, 438 So.2d 358 (Fla. 1983); Jones v. State, 440 So.2d 570 (Fla. 1983); Slaughter v. State, 301 So.2d 762 (Fla. 1974), cert. denied 420 U.S. 1005 (1975). Significantly, in two of the above cases, Jones and Steinhorst, the court noted that the defendant in each case, while alleging that his cross-examination of a state witness had been curtailed, had failed to call the witness himself as a means of "reaching" the desired testimony, which was outside the scope of direct. This represents yet another road untaken by Petitioner in this case, in relation to his cross-examination of witness Baldree as to the alleged look-alike, Terry Wayne Gale.

It is equally significant that the Florida standard of review regarding cross-examination seems compatible with that utilized by federal courts. Thus, circuit courts of appeal throughout the country, recognizing that the scope and extent of cross-examination is within the discretion of the trial court, have held that limitation of cross-examination will not result in reversal unless it is clear that a defendant has been denied his right to confrontation thereby. See United States v. Wesson, 478 F.2d 1180 (7th Cir. 1973); United States v. Haro, 573 F.2d 661 (10th Cir.), cert. denied 439 U.S. 851 (1978); United States v. Weiner, 578 F.2d 757 (9th Cir.), cert. denied 439 U.S. 981 (1978); United States v. Cleveland, 590 F.2d 24 (1st Cir. 1978); Cheek v. Bates, 615 F.2d 559 (1st Cir.), cert. denied 446 U.S. 944 (1980); United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983),

cert. denied, \_\_\_ U.S. \_\_\_, 104 S.Ct. 974 (1984). In observations applicable sub judice, the court in Weiner noted that a trial judge has a duty to control cross-examination and to prevent it from unduly burdening the record with cumulative or irrelevant matter; in Cheek v. Bates the court reversed the granting of a petition for writ of habeas corpus, finding that at trial the defense had never made clear the purpose of their proposed questioning, and that consequently the trial court's ruling had not in fact constituted a curtailment of cross-examination. In light of such precedent, it is clear that the actions of the trial judge in this case are not as unprecedented or iniquitous as Petitioner alleges.

Additionally, as at least three federal courts have recognized, not every restriction in cross-examination results in reversal of a conviction. The Fifth, Seventh and District of Columbia Circuit Courts of Appeal have all found Davis v. Alaska to be no bar to the finding of harmless error in the context of alleged restriction or curtailment of cross-examination. See United States v. Gambler, 662 F.2d 834 (D.C. Cir. 1981); United States ex. rel. Scarpelli v. George, 687 F.2d 1012 (7th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_, 103 S.Ct. 817 (1983); Carrillo v. Perkins, 723 F.2d 1165 (5th Cir. 1984). Thus, in Gambler, the court found that the trial court should have allowed the defense to question a prosecution witness as to the existence of certain civil suits which could exemplify bias; such restriction, however, was found to be harmless in light of the rest of the evidence. A similar result ensued in Carillo, where it was recognized that the trial court had impermissibly prevented the defendant from impeaching a critical state witness. In Scarpelli the appellate court reversed the district court's granting of a petition for writ of habeas corpus, finding that any restriction in cross-examination had been harmless. The above cases are all significant, as Petitioner has asserted that this case presents the proper vehicle for this Court to

determine whether or not a defendant alleging restriction of cross-examination need also show resultant prejudice. Assuming that the Florida Supreme Court considered Petitioner's claim in terms of harmless error, such action would not seem as unprecedented as Petitioner apparently believes.

In conclusion, this Court's exercise or its discretionary jurisdiction would be unwarranted in this case. In addition to Petitioner's failure to demonstrate that he preserved and presented a federal question through all phases of the proceedings, Petitioner has not shown that he is doing more than challenging a discretionary evidentiary ruling of a state trial court. Had Petitioner ever sought to apprise the trial judge of his theory of relevance as to any of his allegedly curtailed lines of questioning, it is more than likely that this appellate point would never have come to exist. As it is, Petitioner asks this Court to presume the violation of his Sixth Amendment right to confrontation and cross-examination based on a record bereft of any showing of prejudice. The Florida Supreme Court thoroughly reviewed Petitioner's conviction and its resolution of this point on appeal regarding cross-examination is in accord with its own precedents, as well as those of this Court and other federal courts. Furthermore, despite Baldree's importance to the case, there was other sufficient evidence from which the jury could find Petitioner guilty of the charges. All of the above factors render the instant case an unsuitable one for certiorari.

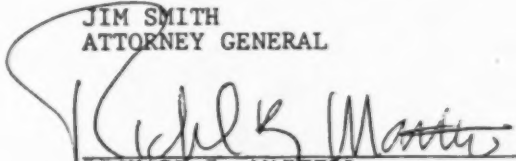
VII.

CONCLUSION

For the foregoing reasons, the instant petition  
for writ of certiorari should be denied.

Respectfully submitted,

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